

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Preliminary Hearing Order succinctly and accurately sets forth the pertinent facts and circumstances surrounding claimant's alleged accident as well as her past medical history. Rather than unnecessarily repeat those facts herein, they are merely adopted and will be supplemented as needed.

Distilled to its essence, claimant alleges she sustained a shoulder injury while working on October 10, 2010. She contends her present shoulder complaints are the worst she's ever had although she concedes she has a long-standing arthritic condition that has caused her significant problems with pain to various parts of her body, including in both of her shoulders, long before October 10, 2010. But claimant maintains that when she lifted a mattress during the normal course of her duties she experienced an acute onset of pain and now requires surgery.

After reviewing claimant's medical records both before and after October 10, 2010, as well as claimant's own testimony, the ALJ found that -

Claimant's vague testimony about her medical condition specifically as to her right shoulder prior to October 10, 2010, is contradicted by the medical records. Claimant's personal physician was of the opinion prior to October 10, 2010, [c]laimant's right shoulder pain was due to something other than her arthritic condition.

For these reasons, it is found and concluded that [c]laimant's right shoulder condition and the need for surgery did not arise out of and in the course of employment.²

Claimant has appealed this determination and points to the opinions authored by Dr. Prostin, who evaluated claimant on February 7, 2011. While it is true that Dr. Prostin has opined that claimant's self-described accident of October 10, 2010 is the source of her present need for surgery to her right shoulder, claimant concedes that she did not tell him of her earlier shoulder complaints.³ His report notes that claimant had "long-standing problems with arthritis with pain at her right shoulder but did not feel impaired by the right

² ALJ Order (Mar. 24, 2011) at 3.

³ P.H. Trans. at 25.

shoulder before the work accident.”⁴ But this does not accurately reflect claimant’s pre-injury history.

In the months before her alleged work injury, claimant had been seen a number of times by Dr. Nancy Nowlin, who was treating her for her arthritic complaints. On September 21, 2010, Dr. Nowlin indicated in an office note that claimant called in complaining of pain in the right shoulder for the past 6 weeks, with a severity as 8 out of 10.⁵ On September 22, 2010, x-rays were completed and according to the records, those results do not explain the severity of claimant’s pain complaints. And that same note indicates clearly that it is the right shoulder that claimant contends is causing her the most pain.⁶

Dr. Nowlin’s office attempted to follow up by scheduling a MRI for the shoulder, but claimant declined due to insurance concerns. But she continued to contact Dr. Nowlin’s office citing pain complaints, this time at 9 out of 10. By October 6, 2010, claimant again saw Dr. Nowlin complaining of right shoulder aches and pain, 9 out of 10, explaining that the pain occurs almost all the time and had been hurting for one month.⁷

The ALJ clearly took notice of the extent of claimant’s medical treatment before the events of October 10, 2010. She concluded that regardless of claimant’s present need for surgery, the greater weight of the evidence establishes that her need for treatment is more likely due to her pre-existing condition rather than any alleged work-related injury. Moreover, Dr. Prostic’s causation opinion is greatly outweighed by claimant’s pre-injury history of right shoulder complaints. This Board Member has reviewed the same evidence and finds the ALJ’s Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

⁴ *Id.*, Cl. Ex. 3 at 1 (Dr. Prostic’s Feb. 7, 2011 report).

⁵ *Id.*, Resp. Ex. A at 11 (Dr. Nowlin’s Sept. 21, 2010 office note).

⁶ This is important as claimant contends that it was her *left* shoulder complaints that Dr. Nowlin was addressing. At other points in the record claimant merely responds that she “doesn’t remember” whether she asserted any right shoulder complaints while being seen by Dr. Nowlin,

⁷ P.H. Trans., Resp. Ex. A at 16 (Dr. Nowlin’s Oct. 6, 2010 office note).

⁸ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated March 24, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2011.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
James C. Wright, Attorney for Self-Insured Respondent
Rebecca Sanders, Administrative Law Judge